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JUN 15 1949
CHARLES ELMORE CROPL
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No. 780

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

DISTRICT OF COLUMBIA, *Petitioner*,

v.

THE SMOOT SAND & GRAVEL CORPORATION, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

The question presented is stated on page 3 of the petition. The attempt of respondent to materially change such question, or to propound additional questions based upon assumption of facts (Resp. Br., p. 2), is improper. Rule 38, par. 2, of this Court provides that: "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

THE FACTS INVOLVED

Petitioner, in its statement of the case (Pet. Br., pp. 7-11), set forth the *material* facts applicable to the question presented, based upon the findings of fact of the Board of Tax Appeals for the District of Columbia. Said findings of fact have not been held to be "clearly wrong". Those findings, therefore, must be accepted as correct. *District of Columbia* v. *Pace*, 320 U. S. 698, 703.

In respondent's brief in opposition, however, the clear pronouncements of this Court in the *Pace* case, *supra*, as to findings of fact of the Board of Tax Appeals have been ignored. In 17 paragraphs (Resp. Br., pp. 3-7) respondent states its alleged "basic facts involved". The findings of fact of the Board of Tax Appeals are referred to in only 2 of the 17 paragraphs (the last paragraph on page 5 and the next-to-last paragraph on page 6 of respondent's brief). All other statements of alleged facts in respondent's brief are founded upon portions of testimony, exhibits, and arguments in briefs filed with the Board. For example:

> (1) Respondent states (Resp. Br., p. 6) that during all of the years involved the "equipment in question" has been assessed for tangible personal property taxation by the Virginia authorities "and the tax so assessed has always been paid". The Board of Tax Appeals found as a fact (R. 38, Finding 16) that: "Petitioner did not pay taxes to Virginia on its scows."
>
> (2) Respondent states (Resp. Br., p. 6) that the daily average number of respondent's scows entering or berthed at the Port of Alexandria ranged from a maximum of 31 to a minimum of 2 during the years involved. The Board of Tax Appeals found as a fact (R. 37, Finding 14) that: "There was no testimony that any of these vessels, with the exception of some of the fuel scows, were ever berthed at, or visited, the Port of Alexandria."

> The Board further found as a fact (R. 36, Fnding 8) that: "Four of petitioner's scows were used to furnish fuel to the dredges", some of which came into Alexandria every ten days to be loaded with fuel oil and some of which came into Washington every week to be loaded with coal. These fuel scows were held not subject to taxation in the District and are not involved in this proceeding (R. 42). Therefore, *not one scow involved in this proceeding ever entered or was berthed at the Port of Alexandria during the tax years involved.*

The foregoing and many other similarly erroneous statements of facts are set forth in a parallel comparison in a supplement to this brief (p. 9-11).

Some of respondent's statements are followed by parenthetical references to certain exhibits and argument in briefs filed with the Board of Tax Appeals which the Court of Appeals, in disallowing costs with respect thereto after the petition for writ of certiorari was filed, stated were "wholly unnecessary in connection with" respondent's "points on review in this case" (Supp., p. 13-14).[1]

Petitioner therefore submits that respondent's statement of alleged basic facts involved should be entirely disregarded by this Court.

REPLIES TO RESPONDENT'S ARGUMENT

On page 13 of respondent's brief it is stated that: "The District of Columbia seeks to avoid the consequences of the *facts* and *authorities* which control in this case by ignoring both * *", etc. In view of what has been pointed out above, petitioner submits that the situation is contrariwise. As set forth above, and in the supplement to this brief, respondent has almost completely ignored the findings of fact

[1] "Supp." means supplement to this brief.

of the Board of Tax Appeals and stated a case from *portions* of the testimony, exhibits, and legal arguments in briefs filed with the Board. Inasmuch as the petition for writ of certiorari in this case was filed May 11, 1949, that the order of the Court of Appeals disallowing certain costs as set forth above was filed two days later on May 13, 1949, and that respondent's brief was filed some time later, on June 3, 1949, it is reasonable to assume that *respondent intentionally ignored the findings of fact of the Board of Tax Appeals.* The respondent's purpose in so doing could only be that it desires to bring itself within the four corners, if possible, of certain decisions of this Court realting to *tax apportionment* and thereby avoid this Court's decisions with respect to the *doctrine of actual situs* in tax cases of this kind.

Petitioner has discussed in its brief (Pet. Br., pp. 15-25) not only the doctrine of "actual situs" on which it relies but, as well, the doctrine of "tax apportionment" on which respondent relies, together with the question as to "due process of law", under the applicable decisions of this Court. Petitioner stated its understanding of the decisions of this Court on the rules of taxation relating to "tax apportionment" and "actual situs" as follows (Pet. Br., p. 19):

> (1) The doctrine of tax apportionment is not applicable to taxation of specific personal property having an "actual situs" in a tax jurisdiction, even when such jurisdiction is Constitutionally limited or restricted under the commerce clause and the Fourteenth Amendment; and that
>
> (2) The rule of tax apportionment applies only where migratory property is *habitually employed within a State* and *when the specific and individual items of property are not continuously the same but are constantly changing as the nature of their use requires.*

In this case the property involved had an *actual situs in the District.* Such property was *specific* and *continuously the same.* As the Board of Tax Appeals pointed out (R. 45), "the *very property* sought to be taxed *had an actual situs and physical presence in the District throughout the entire year,* with the exception of fractional parts of days." (Italics supplied.)

It appears to be respondent's contention (Resp. Br., pp. 8-12) that if tangible personal property is used in interstate commerce the doctrine of tax apportionment must be applied in lieu of the tax doctrine of actual situs. This, petitioner strongly urges, is completely erroneous and contrary to this Court's decisions in the applicable cases, particularly *New York Central R. R. Co.* v. *Miller,* 202 U. S. 584, and *Northwest Airlines* v. *Minnesota,* 322 U. S. 292.

The argument of respondent (Resp. Br., pp. 14, 15) to the effect that the Congress did not have the power to impose the property taxes here involved for the benefit of the District of Columbia is also erroneous. *Gibbons* v. *District of Columbia,* 116 U. S. 404, *Binns* v. *United States,* 194 U. S. 487, *Heald* v. *District of Columbia,* 259 U. S. 114, 124.

Respondent's argument based upon the individual remarks of a member of Congress (Resp. Br., pp. 8, 9) is, also, clearly unsound. This Court, for a long period of time, has consistently held that remarks of individual members of Congress during debate do not establish the intent of Congress. See *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 318 (1897), and *United States* v. *United Mine Workers of America,* 330 U. S. 258, 281, 282 (1947).

On page 10 of respondent's brief it is stated that "On July 17, 1945 Congress was advised by the President of the Board of Commissioners for the District of Columbia * * ", etc. Extensive argument is based thereon. No reference is given to the record where the source of the statment appears in evidence. The document of "July 17, 1945" referred to by respondent is not in evidence; it is attached as

Page 5 bad, back of page 6.

Exhibit "A" to respondent's brief filed with the Board of Tax Appeals (Tr. 78, 94), which brief was one of the items which the Court of Appeals stated in its order filed May 13, 1949, *supra* (Supp., 14, item 3), was "wholly unnecessary" in connection with respondent's points on review in this case.

Respondent also states its "understanding" as to petitioner's handling of respondent's personal property taxes in the District (Resp. Br., p. 10) and refers to "(R. 27-32, 106)". "R. 27-32" is one of respondent's exhibits and "R. 106" is part of respondent's brief filed with the Board of Tax Appeals which the Court of Appeals said, likewise, were "wholly unnecessary" (Supp., p. 14, items 1 and 3).

In connection with the two preceding paragraphs, petitioner has set forth its position with respect to taxation of rolling stock of railroads on page 22 of its brief. There is no factual or legal basis for respondent's assumption that no railroad rolling stock was subject to taxation in the District prior to the Act of December 15, 1945, 59 Stat. 610. It cannot properly be questioned that such railroad rolling stock as had an "acutal situs" in the District was subject to taxation at its full and true value prior to the 1945 Act.

CONCLUSION

It may be that the decision of the Court of Appeals in this case, which petitioner contends constitutes grievous error, resulted from a misunderstanding of the material facts. The briefs filed in that Court will show that respondent erroneously stated such facts, as has been done in respondent's brief filed in this Court.

Without regard to the apparently confused factual situation, however, if it is true as the Court of Appeals stated (R. 201), that "the District of Columbia could constitutionally tax these tangibles [see footnote 2], used exclusively in in-

[2] The Congress of the United States enacted the statutes which imposed the taxes involved.

terstate commerce," only "upon a fair apportionment of value", such situation exists only because the Court of Appeals has so decided. Congress has not declared any such rule of apportionment. On the contrary, Congress has taxed tangible personal property at its "full and true value in lawful money" which was clearly within its power. It is well-established by decisions of this Court that Constitutional limitations applicable to the taxing powers of the respective States are not limitations upon the power of Congress in legislating for the District of Columbia.

Respectfully submitted,

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SUPPLEMENT TO BRIEF

Statements of Alleged Facts in Respondent's Brief:	*Findings of Fact Made by the Board of Tax Appeals:*
1. Page 6.—"During all of the years involved the equipment in question has been assessed for tangible personal property taxation by the Virginia taxing authorities at its Registered Home Port of Alexandria, Virginia, and the tax so assessed has always been paid (Tr. 354, 363, 364, R. 30)."	1. R. 38, Finding 16—"In 1940 the Virginia taxing authorities taxed six dredges, and eight tugs or launches belonging to petitioner on the basis of an assessed value of $15,000 and petitioner paid a tax thereon. Petitioner paid the State of Virginia all of the taxes which that State assessed against floating equipment belonging to petitioner, prior to 1940 and since 1940. * * Petitioner did not pay taxes to Virginia on its scows."
2. Page 6.—"The *daily* average number of respondent's scows entering or berthed at the Port of Alexandria ranged from a maximum of 31 to a minimum of 2 during the years involved."	2. R. 37, Finding 14—"There was no testimony that any of these vessels, with the exception of some of the fuel scows, were ever berthed at, or visited, the Port of Alexandria." R. 36, Finding 8—"Four of petitioner's scows were used to furnish fuel to the dredges. Some of them came into Alexandria every ten days to be loaded with fuel oil, and some came in to Washington every week to be loaded with coal. * * The rest of their time they spent at the site of the dredging operations." (*Note.*—These fuel scows were held not subject to taxation in the District and are not involved in this proceeding. See R. 42.)
3. Page 6.—"By administrative construction the petitioner has always recognized that the District of Columbia tangible personal property tax law does not provide for taxation of the interstate water transportation equipment involved on the basis of apportionment and has expressly conceded in this case that the 'District tax statutes involved do not provide for apportionment.' (Tr. 185)."	3. This matter was not before the Board of Tax Appeals. There is no evidentiary basis for such statement. The basis for the statement, according to the reference "(Tr. 185)" is the District's brief filed with the Board of Tax Appeals wherein it was stated (not as quoted by respondent) that: "The District tax statutes involved do not provide for apportionment *such as contended for by counsel for petitioner.*" (R. 115) The italicized portion was omitted by respondent.

4. Page 6.—"Nevertheless, respondent has always paid tangible personal property tax to the District of Columbia on an equitable basis mutually agreed upon as a fair amount. * * The amount of the assessment agreed upon was revised in the early 1930's and was reviewed and approved by mutual agreement of the parties in 1938."

4. The Board of Tax Appeals did not make a finding that there was any mutual agreement between the parties as to a fair amount of tax. The Board's findings with respect to the so-called agreement of 1938 are contained in Finding 17, as amended (R. 38, 82). The Board found that a "conference" was held; not that there was any agreement in 1938. A memorandum of this conference was included in the transcript of record and printed appendix by respondent (Smoot) in the Court of Appeals (R. 27-32). The Court of Appeals, in disallowing costs with respect thereto after the petition for writ of certiorari was filed, stated that the inclusion of such memorandum "was wholly unnecessary in connection with petitioner's points on review in this case." (Supp. p. 14).

5. Page 6.—"Petitioner's own evidence (R. 85) expressly shows that 'The tangible property of The Smoot Sand & Gravel Corporation' involved in this proceeding . . is 'located outside of Washington, D. C.' at 'various locations in the States of Virginia and Maryland.'" Etc.

5. R. 82, Finding 17—"Petitioner's treasurer pointed out to the assessing authorities that a large part of its deliveries were outside of District of Columbia waters and that consequently, for days at a time, some of its tugs and scows were not in the District waters. This condition as to petitioner's tugs and scows, except in regard to scows used in stripping operations and its fuel scows, did not exist during the fiscal years here involved." (*Note.*—The fuel and stripping scows referred to were held not subject to taxation in the District and are not involved in this proceeding. See R. 42, 125-127.) The references to "(R. 85)" and "(R. 83-95)" in the last paragraph of respondent's statement (Br., pp. 6, 7) are to a motion for reconsideration and legal argument thereof filed with the Board of Tax Appeals, the argument portion of which the Court of Appeals stated was "wholly unnecessary". (Supp. p. 14).

Respondent's statement quoted opposite hereto is based upon an appraisal report dated June 14, 1940 (which was prior to any tax

date here involved), relative to the question of the *value* of the property involved (R. 164, 178, 179, 191). The question of *taxable situs* of the property involved had been previously decided by the Board of Tax Appeals (R. 42) on motion of respondent over the objection of petitioner (R. 42, 122, 123). The Board's opinion (R. 43-49) clearly shows that the question of taxable situs had been disposed of on August 11, 1947. The question as to whether the value of the property was excessive was not heard until October 8, 1947 (R. 164).

6. Page 5.—"Deliveries to the Potomac River bridge were made during the period from September 8, 1939 through June 14, 1940, and required all of respondent's steel scows and much of its remaining transportation facilities."

6. No finding of fact was made by the Board of Tax Appeals. The period of nine months referred to occurred prior to any of the tax years involved in this case.

7. Page 5.—Respondent states that its scows, tugs, and launches, during the entire period involved in this controversy, "were in Virginia and Maryland more than 58% of the time and during 1945 and 1946, when more nearly normal operations were reestablished, they were in Virginia and Maryland more than 66% and 71% of the time, respectively * *."

7. The Board made no finding as to these percentages. The Board's finding was (R. 36, Finding 6): "The nature of petitioner's operations was such that these scows and tugs usually spent more hours per day outside of the District than in the District."

8. Page 5.—"Since 1935 the principal down river deliveries on the Chesapeake Bay and its tributary system of waterways, such as the lower Potomac, Patuxent, the Rappahannock, and the Great Wicomico Rivers have been to 22 places in Virginia and 10 places in Maryland at distances from Washington as far as 182½ miles * *."

8. R. 35, Finding 4—"During all of the years here involved, petitioner's business consisted of dredging sand and gravel from these deposits, *transporting such material by means of scows, towed by its tugs, to its storage places in the District of Columbia, and thereafter selling it from such storage places* and *transporting it therefrom* to the points of delivery, *in most cases by truck* and in some cases by means of scows." (Italics supplied.)